

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY)	
AVERAGE WHOLESALE PRICE)	MDL No. 1456
LITIGATION)	Civil Action No. 01-12257-PBS
)	
THIS DOCUMENT RELATES TO:)	Subcategory 06-11337-PBS
)	Hon. Patti B. Saris
<i>U.S. ex rel. Ven-a-Care of the Florida Keys,</i>)	
<i>Inc. v. Abbott Laboratories, Inc.</i>)	
No. 07-CV-11618-PBS)	

PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, Ven-A-Care of the Florida Keys, Inc. (“VAC”), moves for partial summary judgment under the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-3733, against Abbott for the Erythromycin drugs identified in the Complaint that (1) Abbott’s reported average wholesale prices (“AWPs”) and WACs were false and that AWP’s that Abbott caused to be published by the pricing compendia were false; (2) Abbott “knowingly” reported such false prices under the FCA; (3) Abbott’s false AWP’s and WAC’s for the Erythromycin drugs constituted false statements and caused the submission of false claims to the Medicaid program and caused the State programs to submit false claims to the federal government for federal monies; and also that (4) certain of Abbott’s Affirmative Defenses do not absolve Abbott of liability under the FCA.¹

¹ VAC moves for summary judgment as to the following Affirmative Defenses: Good faith, established industry practice (Seventh Affirmative Defense); laches, estoppel and waiver (Eleventh); Abbott’s actions were not proximate cause of any injury (Thirteenth); Abbott did not make any false statements to the plaintiff, or if false or misleading, Abbott had no reasonable grounds to believe and did not believe that the statements were false or misleading (Fifteenth); in pari delicto or unclean hands (Nineteenth); Plaintiff’s failure to follow state and federal regulatory obligation to set reimbursement rate at appropriate Estimated Acquisition Cost (Twentieth); failure to mitigate damages, plaintiff would be unjustly enriched, consent or ratification to extent government paid for drug products after initial complaint filing in 1998, (Twenty-fifth); Abbott’s conduct was not material to any alleged injuries suffered by plaintiff

Plaintiff is filing an accompanying brief, Local Rule 56.1 Statement of Undisputed Material Facts, a Declaration of Susan Schneider Thomas, and Declaration of Ian M. Dew in support of this Motion.

WHEREFORE Plaintiff asks that this Motion be granted and that the Court grant summary judgment in favor of VAC that:

(1) Abbott's reported AWP's and WAC's for the Erythromycin drugs identified in the Complaint were false, and that the AWP's that Abbott caused to be published were false;

(2) Abbott "knowingly" reported such false prices under the FCA;

(3) Abbott's false AWP's and WAC's for the Erythromycin drugs constituted false statements and caused the submission of false claims to the Medicaid program and caused the State programs to submit false claims to the federal government for federal monies; and

(4) Abbott's Affirmative Defenses (Good faith, established industry practice (Seventh Affirmative Defense); laches, estoppel and waiver (Eleventh); Abbott's actions were not proximate cause of any injury (Thirteenth); Abbott did not make any false statements to the plaintiff, or if false or misleading, Abbott had no reasonable grounds to believe and did not believe that the statements were false or misleading (Fifteenth); in pari delicto or unclean hands (Nineteenth); Plaintiff's failure to follow state and federal regulatory obligation to set reimbursement rate at appropriate Estimated Acquisition Cost (Twentieth); failure to mitigate damages, plaintiff would be unjustly enriched, consent or ratification to extent government paid for drug products after initial complaint filing in 1998, (Twenty-fifth); Abbott's conduct was not material to any alleged injuries suffered by plaintiff (Thirty-First); no reliance by United States

(Thirty-First); no reliance by United States or states (Thirty-Second); plaintiff knew and was aware the AWP was not an actual average of wholesale prices or the actual acquisition cost of drugs (Thirty-Sixth); and contributory or comparative fault because of plaintiff's own conduct or failures (Thirty-Ninth).

or states (Thirty-Second); plaintiff knew and was aware the AWP was not an actual average of wholesale prices or the actual acquisition cost of drugs (Thirty-Sixth); and contributory or comparative fault because of plaintiff's own conduct or failures (Thirty-Ninth)) do not absolve Abbott of liability under the Federal False Claims Act.

Respectfully submitted,

For the relator, Ven-A-Care of the Florida
Keys, Inc.,

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I hereby certify that I have this day caused an electronic copy of the above **PLAINTIFFS'**
MOTION FOR PARTIAL SUMMARY JUDGMENT to be served on all counsel of record
via electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a
copy to LexisNexis File & Serve for posting and notification to all parties.

Dated: August 28, 2009

/s/ Susan Schneider Thomas
Susan Schneider Thomas